A

ZAINUDIN MAKSOM v. MALAYSIA BUILDING SOCIETY BHD & ORS

COURT OF APPEAL, PUTRAJAYA
ZALEHA YUSOF JCA
LAU BEE LAN JCA
B AZIZAH NAWAWI JCA
[CIVIL APPEAL NO: J-01(NCvC)(A)-61-02-2019]
25 FEBRUARY 2021

C ***CIVIL PROCEDURE:*** *Appeal – Leave to appeal – Whether appellant fulfilled threshold requirement of obtaining leave – Determining consideration – Whether leave required where value of subject matter less than RM250,000 – Whether subject matter had been identified and value already determined – Whether appeal competent – Courts of Judicature Act 1964, s. 68(1)(a)*

D The appellant failed to pay the outstanding loan amount which led to a foreclosure action against the appellant by the first respondent to sell the subject property, a piece of land held together with a semi-detached house erected thereon. Upon a successful auction, the subject property was sold to the successful bidder, the second respondent, and a memorandum of contract was executed between the first and second respondents. The appellant sought E to annul the memorandum of contract but the application was dismissed. Subsequently, the appellant filed a notice of motion for extension of time to file an appeal but was dismissed. The appellant thus filed the present originating summons with the same intitulement seeking, primarily, for the same reliefs, but this was also dismissed. The appellant thus filed a notice F of appeal against the order and hence, the application by the first respondent to strike out the notice of appeal ('encl. 11'). The sole issue for determination in this appeal was whether the appellant had fulfilled the threshold requirement of obtaining leave under s. 68(1)(a) of the Courts of Judicature Act 1964 ('CJA'), the failure of which would render the appellant's appeal G incompetent and ought to be struck out.

Held (striking out appeal with no order as to costs):
Per Lau Bee Lan JCA delivering the judgment of the court:

(1) Having regard to the principle of determining the amount or value of the subject matter of the claim being 'at the time of filing the claim', the H value of the subject property, *ie*, the subject of the foreclosure proceedings, was RM206,100 as stated in the memorandum of contract entered between the first respondent and the second respondent. As the amount was below the threshold limit of RM250,000, leave of the Court of Appeal was required. Further, the subject of the claim had been I identified and its value was determined at RM206,100. Therefore, s. 68(1)(a) of the CJA was still applicable. (paras 18 & 20)

(2) It was too late in the day to accede to the appellant's request for a short adjournment to allow the appellant to procure a valuation report to determine the current value of the subject property as he contended that the purchase price of RM206,100 was only the reserve price in 2017. The appellant had every opportunity to engage the services of a registered valuer to conduct a proper valuation of the subject property if he had deemed it necessary then. The appellant had failed to challenge the value of subject property. Hence, the appeal was incompetent. (paras 21 & 22)

Case(s) referred to:
Harcharan Singh Sohan Singh v. Ranjit Kaur S Gean Singh [2011] 3 CLJ 593 FC ***(refd)***
Mohd Tahir Mohd Sheriff v. Ramlah Abdullah [2004] 1 CLJ 865 CA ***(refd)***
Yai Yen Hon v. Teng Ah Kok & Sim Huat Sdn Bhd & Anor [1997] 2 CLJ 68 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 68(1)(a)

For the appellant - Dinesh Praveen Nair; M/s Dinesh Praveen Nair
For the 1st respondent - Nurul Nasyira, Aisyah Razak & Iman Sorkapli; M/s Adillah A Nordin
For the 2nd respondent - M/s Chris Lee & Partners
For the 3rd respondent - State Legal Advisor, Johor

Reported by S Barathi

JUDGMENT

Lau Bee Lan JCA:

Introduction

[1] *Vide* a notice of motion dated 5 April 2019 (encl. 11), Malaysia Building Society Bhd, the first respondent (first defendant in the court below) applied to strike out the notice of appeal dated 31 January 2019 filed by Zainudin bin Maksom, the appellant (plaintiff in the court below) and that costs be in the cause.

[2] The first respondent's application was supported by (i) the affidavit-in-support affirmed on 1 April 2019 (encl. 12), first respondent's affidavit-in-reply (no. 1) affirmed on 22 May 2019 (encl. 14) and first respondent's affidavit-in-reply (no. 2) affirmed on 24 September 2019 (encl. 24). All the said affidavits were affirmed by one Rozilah binti Rozali.

[3] The appellant opposed the first respondent's application by the appellant's affidavit-in-reply (no. 1) affirmed on 2 May 2019 (encl. 13) and appellant's supplementary affidavit affirmed on 29 July 2019 (encl. 19). Both affidavits were affirmed by the appellant.

[4] The first respondent's application to strike out the appellant's appeal is premised on the grounds that:

(i) the appellant's appeal did not fulfil the requirement of s. 68(1)(a) of the Courts of Judicature Act 1964 (Act 91) ("CJA");

(ii) the appellant's action is estopped by *res judicata*; and

(iii) the appellant's failure to come with "clean hands" before the court disentitled him to request for the aid of equity.

[5] The appellant's grounds to oppose the first respondent's application, in summary, are-

(i) the underlying reason to strike out the appeal by the first respondent is to stifle the appeal from being heard;

(ii) *res judicata* does not apply as the merits of the appeal were not heard or decided in Originating Summons No. JB-24NCvC-269-07-2017, its appeal and the court's judgment on 9 January 2019 (made pursuant to Originating Summons No. JB-24NCvC-323-08-2018);

(iii) s. 68(1)(a) of the CJA is inapplicable as the appellant's prayers under Originating Summons No. JB-24NCvC-323-08-2018 are prayers for declarations;

(iv) the appellant's Originating Summons No. JB-24NCvC-323-08-2018 is *bona fide*; and

(v) striking out should not be allowed on public policy grounds.

[6] Having heard and considered the respective parties' cause papers, written submissions and the oral arguments, we had unanimously allowed the first respondent's application in encl. 1, ie, struck out the appeal with no order as to costs. Dissatisfied with the decision the appellant has appealed. These are our reasons in respect of the said decision.

Brief Facts

[7] The brief facts relevant to this appeal are these. This appeal stems from a foreclosure action by the first respondent against the appellant who had failed to pay the outstanding loan amount due as follows:

(i) loan amount: RM162,000;

(ii) monthly installment: RM1,024;

(iii) total repayment made by appellant: RM4,269.22;

(iv) last payment date by appellant: 28 March 2006;

(v) outstanding balance as at 26 December 2012: RM265,118.78 (inclusive of interest).

[8] The first respondent had commenced a foreclosure action against the appellant to sell the subject property, a piece of land held under HSM1315, PTD5235, Mukim Parit Jawa, Daerah Muar, Johor together with a semi-detached house erected thereon.

[9] The chronology of the foreclosure proceedings in the Muar High Court has been neatly summarised by the appellant as follows:

> On 9 November 2012, the first respondent commenced foreclosure proceedings Originating Summons No. 24 (F)NCvC-697-11-2012. Order for sale was granted on 26 December 2012. Between 29 January 2014 to 21 November 2016, six auctions were carried out, some auctions were aborted and some were cancelled as the balance of the auction reserve price was not paid within time. On 13 February 2017, the seventh auction was successful and the subject property was sold to the successful bidder, the second respondent at the reserve price of RM206,100. A memorandum of contract was executed between the first respondent and the second respondent witnessed by the Senior Assistant Registrar of the Muar High Court. On 23 July 2017 the appellant filed Originating Summons No. JB-24NCvC-269-07-2017 to seek an order to annul the memorandum of contract which was dismissed by Halijah Abbas J on 14 December 2017. On 12 February 2018, the appellant filed a notice of appeal in the Court of Appeal with a notice of motion for extension of time to file the said appeal. The Court of Appeal dismissed the latter on 12 April 2018. On 28 August 2018 the appellant filed Originating Summons No. JB-24NCvC-323-08-2018 ("the present OS") with the same intitulement as Originating Summons No. JB-24NCvC-269-07-2017 ("the earlier OS") and seeking primarily for the same reliefs as the present OS. On 9 January 2019, Ahmad Nasfy Yasin J dismissed Originating Summons No. JB-24NCvC-323-08-2018. On 31 January 2019, the appellant filed a notice of appeal against the 9 January 2019 order. Hence the filing of the notice of motion dated 5 April 2019 (encl. 11) by the first respondent on 5 April 2019 to strike out the notice of appeal against the 9 January 2019 order.

Our Decision

[10] We noted that in the notice of motion in encl. 1, there are three grounds upon which the first respondent has mounted to strike out the appellant's notice of appeal as mentioned in para. 4 above. In our considered view, the primary and sole issue before us is whether the appellant has fulfilled the threshold requirement of obtaining leave under s. 68(1)(a) of the CJA, the failure of which would render the appellant's appeal incompetent and ought to be struck out. The other two grounds of whether the appellant is estopped by *res judicata* and whether equity can come to the appellant's aid on account of not coming to court with "clean hands" canvassed by the first respondent are in our view not relevant considerations for the determination of the threshold issue of whether leave is required.

[11] Section 68(1) of the CJA provides, among others, as follows:

Non-appealable matters

68(1) No appeal shall be brought to the Court of Appeal in any of the following cases:

(a) when the amount or value of the subject-matter of the claim (exclusive of interest) is less than two hundred and fifty thousand ringgit, except with the leave of the Court of Appeal;

[12] Counsel for the first respondent submitted that the appellant's appeal is incompetent because as to date, no leave under s. 68(1)(a) of the CJA has been obtained by the appellant. Counsel argued that leave is required because:

(i) the value of the subject matter before the Court of Appeal is only RM206,100, which is the value of the subject property in the memorandum of contract as exhibited in exh. RR-1, affidavit-in-support of the first respondent;

(ii) the loan amount advanced by the first respondent to the appellant is RM162,000 which is even lesser than the value of the subject property as exhibited in exh. RR-5, first respondent's affidavit-in-reply (no. 1).

[13] To bolster their arguments, counsel relied on a decision of this court in *Mohd Tahir Mohd Sheriff v. Ramlah Abdullah* [2004] 1 CLJ 865; [2004] 6 AMR 165 at p. 167, paras. [5] and [6] and the Federal Court case of *Harcharan Singh Sohan Singh v. Ranjit Kaur S Gean Singh* [2011] 3 CLJ 593 at p. 597, para. [3] and p. 600, paras. [18] and [19].

[14] On the other hand, counsel for the appellant in his written submission contended that no leave is required because s. 68(1)(a) of the CJA is not applicable. Counsel submitted that in both the present OS and the earlier OS, the appellant has prayed for declarations to be made against the respondents. In support of the proposition that leave of the Court of Appeal is not required for prayers of declaration, Practice Direction No. 2 dated 17 June 1996 was cited as follows:

Permohonan

Kebenaran Untuk Merayu Ke Mahkamah Rayuan

Adalah didapati sehingga kini ada di antara peguam-peguam yang masih samar-samar sama ada sesuatu kes itu memerlukan terlebih dahulu kebenaran Mahkamah Rayuan sebelum notis rayuan boleh difailkan dalam kes-kes yang tidak ada kaitan dengan amaun atau nilai yang tertentu.

Maka dengan ini, YAA Presiden Mahkamah Rayuan membuat garis panduan bahawa dalam perkara-perkara seperti berikut kebenaran tidaklah diperlukan:

…

(ii) Deklarasi – untuk mengisytiharkan bahawa sesuatu pemberian lesen, perbuatan, peninggalan atau keputusan sesuatu badan atau mana-mana orang yang diberi kuasa oleh undang-undang adalah tidak sah dan terbatal.

[15] Counsel for the appellant further submitted that in any event, the merits of the present OS are related to the validity of the orders given by the Deputy Registrar and the High Court Judge in the earlier OS and not on the value of the land.

[16] It is our respectful opinion that the contention of the appellant is flawed. In our judgment there is merit in the submission of the first respondent that leave under s. 68(1)(a) of the CJA is required. First, the Federal Court in *Harcharan Singh Sohan Singh* (*supra*) endorsed the view of this court in *Mohd Tahir Mohd Sheriff* (*supra*) at p. 599, para. [12] as follows:

We agree with the Court of Appeal's decision in *Mohd Tahir Mohd Sheriff v. Ramlah Abdullah* [2004] 1 CLJ 865 that s. 68(1)(a) of the Act is unambiguous. It clearly states that no appeal shall be brought to the Court of Appeal when the amount or value of the subject matter of the claim (exclusive of interest) is less than RM250,000, except with leave of the Court of Appeal.

[17] Further at p. 599, para. [13] of *Harcharan Singh Sohan Singh*, the Federal Court opined that the phrase "amount or value of the subject matter of the claim" in s. 68(1)(a) of the CJA was considered by the Federal Court in *Yai Yen Hon v. Teng Ah Kok & Sim Huat Sdn Bhd & Anor* [1997] 2 CLJ 68 "where it was held that it must be read as the amount or value of the claim filed in the civil suit and not the judgment amount granted against. That would be the determinant factor in deciding whether leave was necessary". The said principle was reiterated by the Federal Court at p. 600, para. [21] in answering the second question of law posed by following *Yai Yen Hon* (*supra*) and holding that "The time for determining the current value of the subject matter of the claim (exclusive of interest) as raised in Question No. 2, would be at the time of filing the claim".

[18] Having regard to the principle of determining the amount or value of the subject matter of the claim being "at the time of filing the claim" as enunciated in *Harcharan Singh Sohan Singh*, we find that based on the present OS, the value of the subject matter of the claim, ie, the subject property in question which was the subject of the foreclosure proceedings is RM206,100 as stated in the memorandum of contract entered between the first respondent and the second respondent. As the amount is below the threshold limit of RM250,000, leave of the Court of the Appeal is required.

[19] Secondly, the contention of the appellant that no leave is required since the primary relief are for declarations against the respondents and the appellant's reliance on Practice Direction No. 2 of 1996 was an argument similarly ventilated before the Federal Court in *Harcharan Singh Sohan Singh*, this is what the Federal Court had to say at p. 600:

A [18] As for the contention that s. 68(1)(a) of the Act does not apply because the relief sought by the appellant is for a declaration, we agree with the judgment of the Court of Appeal in *Lam Kong Company Ltd. v. Thong Guan Co. Pte Ltd.* (*supra*) where it was held *inter alia* that item (ii) of the Court of Appeal Practice Direction No. 2 of 1996 **only applies to declarations respecting subject matters that have no value attached to**
B **them or those with values that cannot be quantified.**

[19] In the appeal before us, the subject matter of the claim had been identified and its value determined at RM248,500. Therefore we are of the view that s. 68(1)(a) of the Act is still applicable. (emphasis added)

C **[20]** Following the principle established in *Harcharan Singh Sohan Singh*, we similarly find that in the present OS, the subject of the claim has been identified and its value determined at RM206,100. Therefore, contrary to the position taken by the appellant, we are of the considered view that s. 68(1)(a) of the CJA is still applicable.

D **[21]** Thirdly, counsel for the appellant during oral submission admitted that he could not find fault with the high authority of *Harcharan Singh Sohan Singh*. Counsel however sought for a short adjournment to allow the appellant to procure a valuation report from a reputable valuer to determine the current value of the subject property as he contended that the purchase
E price of RM206,100 was only the reserve price in 2017. In our opinion it was too late in the day now to accede to the request of the appellant's counsel as counsel had every opportunity to engage the services of a registered valuer to conduct a proper valuation of the subject property if he had deemed it necessary then. This is because the first respondent had specifically averred in para. 6 of the first respondent's affidavit-in-support as follows:

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6. Responden Kedua telah Berjaya membida Hartanah tersebut pada harga rezab sejumlah RM208,100.00 dan satu Memorandum Kontrak telah ditandatangani di antara Responden Pertama dan Responden Kedua ("Memorandum Kontrak tersebut").

G But alas we find the appellant had failed to challenge the value of the subject property but had merely averred, among others, the following in paras. 6 and 11 of the appellant's affidavit-in-reply (no. 1):

(a) Perenggan-perenggan 3 hingga 15 Affidavit Responden Pertama [1st Respondent's Affidavit in Support] adalah dinafikan; and

H (b) Saya telah dinasihati oleh peguamcara saya bahawa tindakan yang telah difailkan di Mahkamah Tinggi Muar hanyalah untuk memohon deklarasi-deklarasi dan perintah-perintah terhadap Responden-Responden dan tidak berkaitan langsung dengan nilai Hartanah tersebut.

I

Conclusion

[22] In light of the foregoing reasons we concluded that the appellant's appeal was incompetent as the value of the subject matter of the claim was lower than the requisite amount of RM250,000 provided under s. 68(1)(a) of the CJA and leave ought to have been obtained but there was none. We accordingly struck out the appeal with no order as to costs.